

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT NASHVILLE

MARCH 1996, SESSION

FILED

March 13, 1997

**Cecil W. Crowson
Appellate Court Clerk**

STATE OF TENNESSEE,)	C.C.A. NO. 01C01-9508-CC-00255
)	
Appellee,)	FRANKLIN COUNTY
)	
VS.)	HON. BUDDY D. PERRY, JUDGE
)	
DONALD W. BRANTLEY,)	
)	
Appellant.)	
_____)	

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OPINION FILED _____.

AFFIRMED

WILLIAM S. RUSSELL, SPECIAL JUDGE

The appellant, Donald Brantley, was convicted by jury verdict of reckless aggravated assault and carrying a weapon with the intent to go armed.

Brantley has appealed the convictions, alleging that the trial court erred in instructing the jury that reckless aggravated assault could be considered as a lesser included offense on the count charging intentional or knowing aggravated assault. We find no error in the action of the trial court and affirm the convictions.

To effectively review the trial court's decision regarding what lesser included offenses should have been submitted for the jury's consideration, an understanding of the facts of the case is essential. Therefore, a brief summary of the State's proof, accredited by the jury's verdict, follows.

In addition to his primary employment, Donald Brantley owned and managed several pieces of residential rental property, including duplex apartments located on Mason Avenue in Winchester, Tennessee. In early 1994, the victim, Mike Grant, along with his girlfriend, Christy Eavey, rented one of the appellant's duplex apartments.

In April of 1994, the couple's tenure as tenants of Brantley was ending. On Wednesday, April 13, the appellant appeared at Eavey's Tullahoma workplace demanding his past-due rent. Eavey replied that she and Grant were in the process of vacating the apartment, that she was cleaning it, and that Brantley's keys would be returned to him before the end of the week.

Mr. Brantley appeared at Ms. Eavey's place of employment again on the night of Saturday, April 16th, walking up behind her as she waited on a customer. He first demanded his keys, which Eavey retrieved from her automobile and gave him. Brantley then

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wanted to know the whereabouts of Mike Grant, explaining that they had had a verbal altercation earlier in the week about the damage to the back door of the apartment. Brantley, upset because Grant had slammed the door in his face, told Eavey, in effect, that if anything similar happened again, he would "have something for" Mike Grant.

On Sunday, April 17th, the appellant contacted Grant, who was staying with his parents. The men arranged to meet at the previously-rented apartment at 1:00 that afternoon in order to settle up on payment due under the terms of the lease.

Around 12:30 that afternoon, Brantley and his wife arrived at the apartment of another Mason Avenue tenant, two buildings down from Grant's former residence, to await Grant's arrival. Directing that the tenant watch for Grant's vehicle to pass by, Brantley explained that he had an appointment with Grant to collect money owed him, observing that he always got his money. As the Brantleys prepared to leave, the tenant wished appellant luck in his collection effort. Brantley responded by holding up a pistol, remarking that he "had it covered".

Brantley and Grant met and went inside the apartment. Brantley had the lease as well as a sheet of written notations of what he was owed. When Grant disputed some of the charges, Brantley presented the lease, indicating the "fine print" on which he relied in assessing certain charges, including one for the time he spent going to Eavey's workplace to ascertain Grant's whereabouts.

When Brantley brandished the lease agreement, the argument shifted to why Grant had never been provided a copy of the lease. They tussled over the document, which tore. The scuffle then escalated as Brantley shoved the smaller Grant against the wall,

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punching him in the head and saying "I'm going to kill you, you son of a bitch".

At that point, Brantley pulled his pistol from his pocket and pushed it into Grant's face. Grant knocked the gun away and attempted to flee. Brantley immediately pointed the gun, a North American Arms Mini Revolver .22 Magnum, back in Grant's face, pressing it against the side of his mouth and firing. Since the revolver was a single action weapon, the hammer had to be pulled back before it would fire. It required four or five pounds of trigger pull to discharge it.

The bullet entered Mike Grant's face, traveled upwards, hit his cheekbone and exploded. After Grant fell to the floor, Brantley stood over him, saying "I told you so", causing Grant to believe he was going to be shot again. Grant was able to bolt out the apartment door. Law enforcement and medical assistance were summoned.

As a result of the gun shot, Mike Grant was hospitalized for six days and was thereafter housebound for two months. He described the pain he experienced and explained that he underwent surgery during which his face was peeled back so that the bullet fragments could be removed. Two were left in the vicinity of his eye. Plastic surgery followed.

At the scene, the appellant admitted that he was the shooter. Observers noted that Brantley's hair and clothing were neat as he

followed Grant out of the apartment.

In the late afternoon of the day of the shooting, Brantley returned to the home of the tenants where he had awaited Grant's arrival for the 1:00 appointment. Describing himself as "in trouble", Brantley asked his tenants if they had given statements

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to the police or mentioned to anyone that he had been carrying a gun. He went on to tell them that, while he could not ask them to lie, he wanted them to know that they did not have to make any statements when questioned by those investigating the incident.

Appellant challenges his conviction for reckless aggravated assault on the ground that it was error for the trial judge to instruct the jury that the appellant could be convicted of reckless aggravated assault as a lesser included offense of knowing or intentional aggravated assault. Appellant contends that to do so was to effectively inject into the indicted offense of knowing or intentional aggravated assault an extraneous element of recklessness.

We do not agree with appellant's contention. As we have previously held, the mental state of "recklessness" is embraced within both "intentional" and "knowing".

The culpable mental states, intentionally, knowingly, recklessly and criminally negligent, are defined at Tennessee Code Annotated Section 39-11-302. They comprise a hierarchy; that is, by statutory scheme the lesser degrees of culpability are included within those that are greater. State v. Jeffrey Lynn Crowe, C.C.A. No. 03C01-9401-CR-00012, opinion filed July 25, 1995, at pp. 4-7; Tenn. Sent. Commission Comments to Tenn. Code Ann. Section 39-11-301 (1991 Repl.)

Tennessee Code Annotated Section 39-11-301 (a) (2) provides in relevant part: "When recklessness suffices to establish an element, that element is also established if a person acts intentionally or knowingly". Thus, recklessness is a level of mental culpability lower than and embraced within both intentionally and knowingly. Therefore, under the appropriate facts, reckless aggravated assault is properly charged as a lesser

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included offense of knowing or intentional aggravated assault.

In this case, the facts strongly support the trial judge's decision to include reckless aggravated assault in his instructions to the jury. Very briefly, appellant arranged a one-on-one meeting with the victim in order to collect money purportedly due him under a lease. The two men had very recently had an argument. To the meeting, the appellant carried a concealed but readily accessible loaded revolver.

During the altercation which almost inevitably ensued, the appellant pulled the weapon from his pocket, displayed it and stated his intention to use it to kill the victim. He then put the barrel of the cocked pistol against the victim's face, at which point, according to appellant's testimony, it accidentally discharged, striking the victim in the face.

Under these facts, the trial judge acted correctly in charging the jury that it could convict the appellant of reckless aggravated assault as a lesser included offense of knowing or intentional aggravated assault.

These convictions are affirmed.

WILLIAM S. RUSSELL, SPECIAL JUDGE

PER CURIAM

HAYNES, J.

SMITH, J.

RUSSELL, Sp. J.

